

**Board of Alien Labor Certification Appeals**  
**800 K Street, N.W.**  
**Washington, D.C. 20001-8002**

DATE: May 23, 1997  
CASE NO.: 95-INA-523

***In the Matter of:***

PAUL DAVID NASSAU  
*Employer*

***On Behalf of:***

BARBARA WASEK  
*Alien*

Before: Holmes, Huddleston, and Neusner  
Administrative Law Judges

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by the Employer on behalf of the above-named alien pursuant to §212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,<sup>1</sup> and any written argument of the parties. § 656.27(c).

### **Statement of the Case**

On May 25, 1994, Paul David Nassau ("employer") filed an application for labor certification to enable Barbara Wasek ("alien") to fill the position of Live-out Kosher Cook at an hourly wage of \$12.81 (AF 8). The job duties for the position are described as follows:

Prepares, seasons, and cooks soups, meats, vegetables, etc. according to the principles of Kosher Cuisine. Bakes, broils and steams meat, fish and other food. Prepares meats such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorates dishes according to the nature of celebration. Purchases foodstuff and accounts for the expenses incurred. Cleans the kitchen, washes the dishes.

On March 29, 1995, the CO issued a Notice of Findings("NOF") proposing to deny the labor certification. The CO argued that the employer failed to establish that the position was full-time. The CO therefore requested that the employer submit evidence which clearly establishes that the position constitutes permanent full-time employment according to section 656.3 of the regulations.

In rebuttal, dated April 3, 1995, the employer stated that the cook will work in the household of his two elderly parents. He explained that breakfast, lunch, afternoon tea, and dinner will be prepared daily. The employer estimated that the cook would spend approximately three to four hours preparing meals, two hours serving the meals, one hour cleaning up after the meals, and another hour shopping for the stock and ingredients (AF 33). The employer stated that the employee's duties will be exclusively limited to that of a cook, and occasionally the cook will prepare meals for seasonal events such as Thanksgiving.

The CO issued the Final Determination on May 5, 1995 denying the labor certification. The CO concluded that the employer did not adequately document that the job duties constituted full-time, eight hours per day, five days per week employment.

On May 15, 1995, the employer requested administrative review of Denial of Labor Certification pursuant to section 656.26(b)(1)(AF 46).

### **Discussion**

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "Afn," where *n* represents the page number.

According to section 656.3 of the regulations, employment means permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that the position is permanent and full-time, and if the employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988).

In the NOF, the CO requested that the employer submit evidence demonstrating that the position was full-time. The CO specifically requested the employer to document the number of meals prepared daily, and the length of time required for preparation; to identify the individuals for whom the worker is cooking each meal; and to provide a one-week schedule accounting for the cook's daily duties(AF 29). The CO also asked the employer whether the alien would be performing general household duties such as laundering, vacuuming, and cleaning.

In response, the employer stated that the duties would consist of shopping for ingredients, along with preparing, serving, and cleaning up after meals. The employer stated that although only two persons were being served, great attention would be paid to the quality of the food. The employer further maintained that the cook was not being hired to fulfill any other duties around the house, and that the cook's duties would be limited exclusively to that of a cook. Finally, the employer stated that his wife currently cooks for his parents and that her increasingly busy schedule will not permit her to continue to perform this duty.

In denying certification, the CO relied on two points. First, the CO stated that the job description and schedule were insufficient to establish that the position was for full-time employment. Specifically, the CO questioned the employer's estimates as to the amount of time needed to prepare and serve the meals, and found these requirements to be unreasonable. Second, the CO found it determinative that the employer's wife, who works outside the home at least three hours a day, currently performs the duties of a cook for the employer's parents. Therefore, the CO concluded that the job opportunity can be accomplished on a part-time rather than full-time basis.

The employer argues that the CO's reasoning underlying the denial is speculative and arbitrary because the CO uses terms such as "vague" and "unrealistic" in describing the employer's rebuttal. *See Han Yang Sewing Machine Co.*, 88-INA-207 (June 29, 1989) (denial reversed because it was based on a speculative assertion that the employer's business could not support a full-time market analyst). While it is true that these are words have little legal significance, it remains apparent that the CO's foundation for the denial is sound. Additionally, it is clear that the CO is not required to accept rebuttal evidence as credible or true. Rather, the CO must consider the employer's statements and accord them the weight they rationally deserve. *Gencorp.*, 87-INA-659 (Jan. 13, 1988) (en banc). The CO clearly stated that the employer bears the burden of showing that the position was full-time, and it is evident from the record that the employer did not meet this burden. *Cathay Carpet Mills Inc.*, 87-INA-61 (Dec. 7, 1988) (en banc) (it is well-settled that an employer has the burden of proof).

### **ORDER**

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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JOHN C. HOLMES  
Administrative Law Judge

**NOTICE FOR PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted, except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office Of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.